

**BEFORE THE
FEDERAL MARITIME COMMISSION**

DOCKET NO. 12-03

**THE AUCTION BLOCK COMPANY, an ALASKA CORPORATION, and HARBOR
LEASING, LLC, an ALASKA LIMITED LIABILITY COMPANY**

v.

THE CITY OF HOMER, a MUNICIPAL CORPORATION, and its PORT OF HOMER

**REPLY TO COMPLAINANTS' EXCEPTIONS
AND RESPONSE TO COMPLAINANTS' MOTION AND MEMORANDUM FOR
ORAL ARGUMENT ON COMPLAINANTS' EXCEPTIONS**

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TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
I. INTRODUCTION	1
II. RELEVANT FACTS AND BACKGROUND	2
A. Past Proceedings	2
B. Exceptions	3
III. ARGUMENT	5
A. The City's Fish Dock Operations Fall Outside the FMC's Subject Matter Jurisdiction	5
1. The ALJ Properly Limited Her Review of the City's MTO Status to Activities at the Fish Dock	5
2. The City is not an MTO at the Fish Dock	13
a. Auction Block Failed to Establish that it is a Common Carrier	13
b. The City Does Not Provide Terminal Facilities in Connection with a Common Carrier on the Fish Dock	17
B. The ALJ Properly Granted the City's Motion to Strike and For Sanctions	19
C. Auction Block's Allegations of Technical and Procedural Error are Without Merit	21
1. The City Properly Denied Auction Block's Allegations in its Answer	21
2. The City's Affidavits are not "Untimely Testimony"	23
3. The City's Affidavits are not Parol Evidence	26
D. Conclusion	28

TABLE OF AUTHORITIES

Federal Maritime Commission

<i>Cosco Container Lines v. Port of New York and New Jersey</i> , FMC Dkt. 11-12 (ALJ June 20, 2013).....	6
<i>Petchem, Inc. v. Canaveral Port Auth.</i> , 23 S.R.R. 974 (FMC 1986).....	12
<i>R.O. White & Co. et al. v. Port of Miami Terminal Operating Co., et al.</i> , FMC Dkt. 06-11 (ALJ July 28, 2009)	9, 10

U.S. Court of Appeals

<i>Alabama Power Co. v. Gorsuch</i> , 672 F.2d 1 (D.C. Cir.1982)	16
<i>Capital Transportation, Inc. v. Federal Maritime Commission</i> , 612 F.2d 1312 (1st Cir. 1979)	23
<i>Carducci v. Regan</i> , 714 F.2d 171 (D.C. Cir. 1983)	16
<i>Davis v. Bancorp</i> , 383 F.3d 761 (8th Cir. 2004)	26
<i>Gutierrez v. AT&T Broadband, LLC</i> , 382 F.3d 725 (7th Cir. 2004)	26
<i>Puerto Rico Ports Authority v. Federal Maritime Commission</i> , 919 F.2d 799 (1st Cir. 1990)	7, 9
<i>Slater v. Potter</i> , 28 F. App'x 512 (6th Cir. 2002)	16

Alaska Cases

<i>Lower Kuskokwim School Dist. v. Alaska Diversified Contractors, Inc.</i> , 734 P.2d 62 (Alaska 1987).....	26
<i>Norville v. Carr-Gottstein Foods Co.</i> , 84 P.3d 996 (Alaska 2004).....	26
<i>State v. O'Neill Investigations, Inc.</i> , 609 P.2d 520 (Alaska 1980).....	17

Other Cases

<i>Bridgeport and Port Jefferson Steamboat Co. v. Bridgeport Port Authority</i> , 335 F.Supp.2d 275 (D.Conn. 2004)	9
<i>Design Strategies v. Davis</i> , 228 F.R.D. 210 (S.D.N.Y. 2005).....	26
<i>S.E.C. v. Morelli</i> , 143 F.R.D. 42 (S.D.N.Y. 1992).....	27

U.S. Code

46 U.S.C. § 1702(18)	22
46 U.S.C. § 40102(14)	18, 22
46 U.S.C. § 40102(6)	14
46 U.S.C. § 41102(b)	2
46 U.S.C. § 41102(c)	2, 8, 13
46 U.S.C. § 41106(1)	2
46 U.S.C. § 41106(2)	2, 8
46 U.S.C. § 41106(3)	2, 8
46 U.S.C. § 41108(2)	27
46 U.S.C. § 502.221(d)(2)	17

Code of Federal Regulations

46 C.F.R. § 502.64	22
46 C.F.R. § 502.64(a)	22
46 C.F.R. § 515.2(p)	22
46 C.F.R. § 525.1(c)(17)	27

I. INTRODUCTION

On June 21, 2013, The Auction Block Co. and Harbor Leasing, LLC (collectively, "Auction Block") filed Complainants' Exceptions Brief ("Exceptions") challenging Administrative Law Judge Erin Wirth's ("ALJ") conclusion that the Federal Maritime Commission ("FMC") lacks subject matter jurisdiction over Auction Block's claims. In its Exceptions, Auction Block did not expressly challenge the ALJ's findings of fact regarding jurisdiction but rather took issue with the ALJ's application of the law. According to Auction Block, the ALJ's finding that the City operates as a marine terminal operator ("MTO") under the Shipping Act of 1984 ("Act") at one facility, necessitates a finding that the City operates as an MTO at all of its facilities, including the Fish Dock, which is the facility at which Auction Block is serviced. In addition, Auction Block took exception to the ALJ's decision granting in part the City's Motion to Strike and for Sanctions filed February 14, 2013, as well as the ALJ's findings regarding various procedural and technical matters. These peripheral challenges also focused on the ALJ's conclusions of law and did not directly dispute the ALJ's factual findings.

Contrary to Auction Block's assertions in its Exceptions, the ALJ issued a comprehensive decision, well grounded in the law and heavily supported by the record. Auction Block categorically fails to present any case precedent or evidence contrary to the ALJ's conclusions and thus the Initial Decision ("Decision") should be affirmed.

Additionally, the exhaustive pleadings in this case and the extensive record make oral argument unnecessary. Auction Block's challenges are primarily based in law rather than fact and the relevant case precedent has been thoroughly and

repeatedly briefed by the parties. The Decision provides clear factual and legal bases for the ALJ's conclusions. Accordingly, the City respectfully requests that Auction Block's Motion for Oral Argument be denied.

II. RELEVANT FACTS AND BACKGROUND

A. Past Proceedings

The instant proceeding began on April 10, 2012, with the filing of Complainants' first Complaint before the FMC. The Complaint, and three iterations that followed it, claimed that the City violated 46 U.S.C. §§ 41102(b)(c) and §§ 41106(1)(2)(3). Over the course of the litigation, Auction Block agreed to drop claims that the City violated 46 U.S.C. § 41102(b) and § 41106(1). See Fourth Amended Complaint, CX 0272-280. Auction Block's action against the City generally alleged that the City violated the Act because it entered into an uplands lease with Auction Block, a commercial fish broker hoping to become a fish buyer/processor/restaurateur, with less favorable terms than a lease between the City and Icicle Seafoods, Inc. ("Icicle"), a major fish processor/buyer operating in Homer for over 30 years. Thus, Auction Block ultimately asserted that the City, as an MTO: (1) failed to "establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering of property"; (2) gave "undue or unreasonable preference or advantage or imposed undue or unreasonable prejudice or disadvantage with respect to a person"; and (3) unreasonably refused to deal or negotiate with Auction Block.

The City argued in response that: (1) it did and does adopt and impose just and reasonable regulations and practices throughout the municipality; (2) that any advantage afforded Icicle was reasonable and that no prejudice was imposed upon

Auction Block at any time; and (3) that the City engaged in exhaustive efforts to negotiate or deal with Auction Block to no avail. The City also argued that the City was not an MTO at the facility at issue and Auction Block was not a vessel or non-vessel common carrier under the Act and thus the FMC did not have subject matter jurisdiction.

On May 20, 2013, the ALJ issued the Decision dismissing Auction Block's Fourth Amended Complaint ("Complaint") with prejudice because the FMC lacks jurisdiction. On June 21, 2013, Auction Block filed Complainants' Exceptions Brief, in which Auction Block took exception to the ALJ's ultimate conclusions of law.

B. Exceptions

Auction Block takes exception to the ALJ's conclusion that it failed to establish subject matter jurisdiction and the ALJ's order granting, in part, the City's Motion to Strike and for Sanctions. Exceptions, 1-2. Although these exceptions are unwarranted, they are procedurally appropriate challenges to the ALJ's findings. Auction Block also takes exception to findings that the ALJ did not reach but that Auction Block contends must be addressed to avoid waiver. See Exceptions, 1. These issues include Auction Block's arguments that:

1. Auction Block's "Proposed Findings of Fact No. 1-109 should be deemed admitted as a matter of law."
2. Testimony presented by the City via the affidavits of Mr. Wrede, Mr. Hawkins, Mr. Woodruff, and Mr. Sharp, who are virtually all of the City's witnesses, should be stricken as untimely disclosed.
3. The ALJ should have stricken "self-serving litigation-related expressions of prior subjective intent or understanding and parol evidence by certain witnesses."

Exceptions, 2.

Auction Block's attempt to bar the City from defending itself by whatever procedural means imaginable serves only as a distraction from the well-grounded conclusions in the Decision. Arguably, the FMC need not consider Auction Block's accusations of procedural defects because even if all evidence submitted by the City is ignored, Auction Block's failure to meet its burden and present any evidence establishing jurisdiction supports dismissal in this case. In that same vein, these issues are not ripe for FMC review as the ALJ has yet to rule on them. That said, the City has addressed all exceptions made by Auction Block regardless of their propriety.

As noted by Auction Block, the ALJ did not reach the merits of Auction Block's substantive statutory claims. Consequently, the City limits its argument to the conclusions reached in the ALJ's Decision. While Auction Block also claims that it is not "rearguing the substantive statutory violations," it recklessly throws damning accusations and wildly inaccurate statements into its Exceptions in what can only be an effort to color the FMC's assessment of jurisdiction. See, e.g., Exceptions, 3-4, fn. 4 (allegations of fraud and prejudicial treatment), and 23 (accusation that the City has a monopoly on all terminal services). In the event that the FMC puts weight on any of these allegations or misstatements by Auction Block or decides to review its substantive claims under the Act, the City respectfully requests that the FMC review the Brief of Respondents City of Homer and Its Port of Homer ("Respondents' Brief") filed January 4, 2013, and its Motion to Strike and for Sanctions filed on February 14, 2013, which are both incorporated into this Response for that purpose.

III. ARGUMENT

Auction Block, in a transparent attempt to avoid challenging the Decision on its merits, misrepresents the ALJ's conclusions of law and then attacks those conclusions based upon its own misrepresentations. As a result, it is imperative that the FMC ground its review in the explicit determinations of the ALJ and not Auction Block's misleading summary of the ALJ's findings. The ALJ properly determined that the FMC does not have subject matter jurisdiction over Auction Block's claims and the Decision clearly reflects her consideration of all evidence submitted by both parties in reaching her decision. Accordingly, Auction Block's exceptions are unsupported by law and fact and the Decision should be upheld.

A. The City's Fish Dock Operations Fall Outside the FMC's Subject Matter Jurisdiction

In the Decision, ALJ Wirth concluded that the FMC did not have subject matter jurisdiction over Auction Block's claims because the City did not qualify as an MTO at the Fish Dock. In reaching this determination, the ALJ chose to analyze the City's status as an MTO at the Fish Dock, rather than at any other City facility. In so doing, she concluded that Auction Block failed to prove the City was an MTO at the Fish Dock because it did not establish that (1) Auction Block is a common carrier or that (2) the Fish Dock provides services in connection with a common carrier. See *generally* Decision. The ALJ based each of these conclusions on existing case precedent and the record.

1. The ALJ Properly Limited Her Review of the City's MTO Status to Activities at the Fish Dock

In its Exceptions, Auction Block presumes that if the City operates as an MTO at any City facility, it is an MTO for all purposes. See, e.g., Exceptions, 9; 13. Based

upon this presumption, Auction Block rejects the ALJ's conclusions because the City admitted it was an MTO at its Deep Water Dock and Pioneer Dock and thus, according to Auction Block, the FMC has *carte blanche* jurisdiction over City services. This presumption directly contradicts the purpose of the Act, interpretation of the Act by both the FMC and the federal courts, and common sense.

Despite Auction Block's attempt to distort its own and the City's activities at the Fish Dock to fit within the purview of the Act¹, the ALJ astutely recognized that application of the Act to the activities on the Fish Dock would directly contradict the purposes of the Act. See Decision, 24. Specifically, ALJ Wirth states:

[t]he purpose of the Shipping Act is to encourage participation by United States shipping in the international shipping cartels, but prohibit discrimination by terminal facilities serving the commercial maritime trade. The local Alaska fishing industry does not implicate the international commercial maritime trade nor restrict access to international commerce.

Id. (Citations omitted).

Application of the Act to all municipal activities, regardless of the relationship of those activities to the shipping industry, greatly exceeds the scope of the Act. The Shipping Acts were created to revitalize the United States shipping industry and not to interfere with local governance in areas wholly unrelated to the shipping industry.

According to the United States Court of Appeals:

At the outset of World War I, the shipping industry in the United States was lagging far behind its international competitors. In the years immediately preceding the war about ninety percent of all United States'

¹ For example, Auction Block falsely asserts, without any citation to the record, that this case presents facts analogous to those in *Cosco Container Lines v. Port of New York and New Jersey*, FMC Dkt. 11-12 (ALJ June 20, 2013). See Exceptions, 5. *Cosco Container Lines* has no relevance to the case at hand and Auction Block's frivolous assertion to the contrary should be disregarded.

water-carried exports were shipped in foreign vessels. Congress recognized that in order for the United States shipping industry to survive and prosper in an international climate dominated by shipping cartels ("conferences"), it must grant antitrust immunity to the shipping cartels. To ensure that shipping monopolies did not result, however, Congress implemented a scheme of regulation which, among other things, provided for disclosure of all conference agreements, established the United States Shipping Board (predecessor of the Federal Maritime Commission), and prohibited discrimination in shipping. Congress realized that in order to regulate effectively the practices of water carriers, the Shipping Board also must "have supervision of all those incidental facilities connected with the main [water] carriers."

Puerto Rico Ports Authority v. Federal Maritime Commission, 919 F.2d 799, 806-807 (C.A. 1st 1990) (citations omitted).

The purpose of the Act was unequivocally to incentivize and regulate the international shipment of cargo aboard vessels and the services provided in connection with such shipment. The front end of the fishing industry has nothing to do with the shipping industry. It involves the extraction of a natural resource (fish) from the waters surrounding Alaska and the delivery of that natural resource to buyers along the Alaska coast. The terminal services provided by the City on the Fish Dock are designed to assist commercial fishermen in delivering fish directly to the buyer. Cranes are provided for lifting nets full of fish and ice is available for preserving fish. If the United States suddenly banned international shipping via vessel, the Fish Dock would continue to service the same types of vessels and operate exactly as it does today. The nature of the services at the Fish Dock is clearly reflected in the record. See, e.g., Decision, 6; 10-11 and citations to the record contained therein.

The natural consequence of Auction Block's interpretation would not only include unintended regulation of the heavily localized fishing industry², it would expand the FMC's jurisdiction to municipal services that have no connection to marine services, much less international shipping. The City could feasibly face a challenge before the FMC regarding an unreasonable preference given in its utility rates or an alleged disadvantage suffered by a lessee on property located miles from the coast. See 46 U.S.C. §§ 41106(2)(3). Similarly, a complainant could bring a claim before the FMC challenging the City's zoning provisions regarding junkyards or any other business in which property is handled, stored or delivered. See 46 U.S.C. § 41102(c).

Of course the City strives to adopt and impose just and reasonable laws. However, to the extent that the City fails to do so, the City's actions that do not involve activities in connection with a common carrier are subject to the constitutional and statutory laws of the State of Alaska and the United States, not the Act. Certainly the FMC does not have the resources or the infrastructure to expand its scope to the unconstitutional extent recommended by Auction Block's faulty rationale.

In addition to the express purpose of the Act, the ALJ relied upon decisions by the federal courts in support of her review of City services on a facility-by-facility rather than a municipality-wide basis. The federal courts, clearly aware of the many

² Auction Block claims that while the fishing industry is heavily regulated, no government entity involves itself with the international shipping of fish. See Exceptions, 23-24. Auction Block is demanding that the FMC involve itself with the regulation and oversight of services on the Fish Dock. The services provided involve support for the front end of the fishing industry and not the handling of fish by common carriers or the transportation of fish overseas. Thus, Auction Block presents a distinction without a difference.

services provided by local governments within their boundaries, have limited the review of jurisdiction to the activities and services at the facility at issue. In *Puerto Rico Ports Authority*, the United States Court of Appeals (First Circuit) expressly limited its review of the FMC's jurisdiction over a service fee charged by the PRPA at its Ponce facilities to activities at that location rather than terminal services provided at other PRPA locations where common carriers were provided greater services. *Puerto Rico Ports Authority*, 919 F.2d at 803. In that case, the court expressly found that "services provided at other ports were not sufficient to create jurisdiction." *Id.* Similarly, in *Bridgeport and Port Jefferson Steamboat Co. v. Bridgeport Port Authority*, 335 F.Supp.2d 275, 281-283 (D.Conn. 2004), the federal district court found that the FMC lacked jurisdiction over the "Water Street facility," which exclusively serviced non-common carriers.

Auction Block argues in its Exceptions that the FMC has sanctioned its "an MTO somewhere equals an MTO everywhere" approach. See Exceptions, 9-10. In support of its position, Auction Block cites *R.O. White & Co. et al. v. Port of Miami Terminal Operating Co., et al.*, FMC Dkt. 06-11 (ALJ July 28, 2009), a case in which ALJ Paul Lang found that the FMC had personal jurisdiction over a company comprised of several "former" MTOs. See Exceptions, 9-10. In that case, ALJ Lang extended the personal jurisdiction of the FMC to reach members of an umbrella company that suspiciously engaged in violations of the Act shortly after the company's formation. More particularly, several companies that previously acted and registered as MTOs for business conducted at the Miami facility banded together to form Port of Miami Terminal Operating Co. ("POMTOC") and then engaged in

exclusionary tactics at the Miami Terminal against a stevedore that would not agree to become a member of POMTOC.

When challenged before the FMC, the individual member companies conveniently claimed that the FMC did not have personal jurisdiction over the individual companies because they no longer were MTOs at the Miami facility and the FMC could not pierce their corporate veils to reach the individual companies. *R.O. White & Co. et al.*, 32. Prior to the creation of POMTOC, all of its members were registered and admitted MTOs at the Miami facility. However, after creating POMTOC the members suddenly claimed that their previous MTO status had ceased. *Id.* Even after creation of POMTOC, the members continued to actively control management of POMTOC facilities. *Id.* at 33. ALJ Lang determined that:

By consolidating their marine terminal operations the members have surrendered some of the independence that they exercised in running their own terminals, but, in view of the degree of retained control, they have not changed their status as marine terminal operators.

Id. at 34.

The case at hand bears absolutely no resemblance to *R.O. White & Co. et al.* Most importantly, ALJ Lang's decision involved the scope of *personal* jurisdiction before the FMC and the FMC's ability to pierce the corporate veil. He found personal jurisdiction based upon his determination that the individual member companies remained involved in the management of the Miami terminal even after the formation of POMTOC. *Id.* at 34. While ALJ Lang noted that POMTOC failed to cite any authority in support of the proposition that personal jurisdiction is to be determined separately at each port, he recognized the importance of basing jurisdiction on the nature of an MTO's activities at the premises. *Id.* at 34-35.

Here, subject matter rather than personal jurisdiction is at issue and thus the focus is the nature of the activities at the facility in question rather than the identity of the entity performing those activities.

Once ALJ Wirth determined that a facility-by-facility analysis was appropriate, she properly concluded that the Fish Dock constituted a separate facility within the City based upon a comprehensive presentation of the evidence submitted by both parties. In the Decision, the ALJ concluded that the Homer Port and Harbor is located on a 4.5 mile long promontory into Kachemak Bay called the Homer Spit (the "Spit"). Initial Decision, 6, Finding No. 4. The Spit is home to three separate and distinct terminal facilities. *Id.* at 10, Finding No. 41. At the very end of the Spit and outside the City harbor, the City operates its Deep Water Dock and its Pioneer Dock. *Id.* at 10, Finding No. 43. Within the City Harbor, which is created and protected by a jetty, the City operates the Fish Dock and small boat docks. *Id.* at 10, Finding No. 44.

The ALJ expanded upon these findings, recognizing the differences between operations on each of the docks. She noted that unlike the Fish Dock, the Deep Water Dock and the Pioneer Dock are able to accommodate large deep draft ocean going vessels due to their open water location on Kachemak Bay and the deeper waters surrounding those docks. *Id.* at 10, Finding No. 45. She further recognized that the Deep Water Dock is the terminal facility where large vessels such as common carriers, scrap metal barges, Icicle's floating processor, and cruise ships dock. *Id.* at 10, Finding No. 47. Additionally, she found that the Pioneer Dock and Deep Water Dock have designated restricted/non-restricted areas, gated TWIC access, and comply with the United States Coast Guard's requirements for

regulated/non-regulated vessels utilizing those facilities. *Id.* at 10, Finding No. 49. The ALJ provided citations to the record for each of her findings.

Auction Block, on the other hand, does not directly challenge any of these findings in its Exceptions. In its Response to Respondents' Proposed Findings of Fact, Auction Block does respond to the above assertions by disputing that the City facilities are distinct and separate. It does not, however, deny the proposed findings or provide a single citation to the record supporting its dispute. See Complainants' Response to Respondents' Findings of Fact, Nos. 51-59, pp. 18-21.

Auction Block has consistently argued, both in its Response to Respondents' Findings of Fact and in its Exceptions, that the City's facilities should be treated as one because the City files a tariff with the FMC. See Decision, 23. The ALJ correctly determined that an entity does not automatically subject itself to the FMC's jurisdiction simply by filing a tariff. *Id.* In support for this conclusion, the ALJ cites to what Auction Block refers to as a "celebrated decision," *Petchem, Inc. v. Canaveral Port Auth.*, 23 S.R.R. 974, 983 (FMC 1986); Exceptions, 14. In *Petchem, Inc.*, the FMC was not even willing to find jurisdiction where a tariff was published *and* solicitations were made for common carriers. The FMC reasoned "[i]f jurisdiction were to be found here over Port Canaveral on the basis of its tariff publication and solicitation of common carriers, an explicit extension of existing precedent would be required." *Id.* To date, the FMC has not made that "explicit extension of existing precedent" and thus the ALJ's decision was proper.

The City of Homer is a small town that highly values transparency and public knowledge. The City has repeatedly asserted and the ALJ has rightly found that

while the City chooses to apply the tariff to the Fish Dock, it does so to ensure transparent and uniform governance of all City facilities and never intended to subject itself to the Act for conduct on that dock. Decision, 11, Finding No. 57. Auction Block's suggestion that the City expanded the FMC's jurisdiction not by actually providing services to common carriers on the Fish Dock but simply by publishing rates that apply to current users of that Dock is without merit and wholly unsupported by controlling law.³

2. The City is not an MTO at the Fish Dock

Not only did the ALJ correctly focus on the facilities at the Fish Dock, she justifiably determined that Auction Block failed to establish that (1) it was a common carrier or that (2) the City provides services in connection with other common carriers at the Fish Dock.⁴

a. Auction Block Failed to Establish that it is a Common Carrier

The ALJ's determination that Auction Block failed to establish that it was a common carrier is validated by Auction Block's silence regarding its status as a

³ Auction Block also makes accusations against the City regarding its application of alternative fee structures with certain lessees, including Icicle, and the City's reliance on a provision in the tariff and a provision in the Homer City Code (which is incorporated into the tariff by reference) to do so. See Exceptions, 13-14. The City has presented sound defenses to this accusation in its prior pleadings, which involve a detailed explanation of the City Code, its tariff, the facts surrounding the agreements in question, and relevant case precedent. See Respondents' Brief, 4-6; 41-43. The City refrains from reiterating its defense here as that issue relates to compliance with 46 U.S.C. § 41102(c) and has not yet been decided by the ALJ.

⁴ As recognized by the ALJ, neither party disputes that the Fish Dock provides terminal services that, if found to be provided in connection with a common carrier, would fall within the Act. Decision, 19. Therefore, all Auction Block's references to case precedent regarding the nature of services that fall within the Act are irrelevant.

common carrier in its Exceptions. See *generally*, Exceptions. In fact, Auction Block seems to have abandoned its earlier claim that it is a common carrier, emphasizing only its role as a “person” under the Act and the use of City facilities by other common carriers. See *id.* at 16. Despite Auction Block’s failure to explicitly raise the issue, the City takes this opportunity to emphasize the propriety of the ALJ’s determination that Auction Block failed to establish it was a common carrier.

Pursuant to 46 U.S.C. § 40102(6), a “common carrier” for purposes of the Act is a person that:

- (i) holds itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation;
- (ii) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and
- (iii) uses, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country

The ALJ pragmatically applied this definition to Auction Block and determined that it was not a common carrier. The ALJ found that Auction Block admitted that it does not “hold out to transport cargo or passengers by water” through its statement that “Auction Block does not advertise the transportation of either cargo or passengers by water, but the transportation of cargo is structured into the business operations despite not being separately noted in representations to the public.” Decision, 22, citing to CX 27. Despite Auction Block’s admission, the ALJ delved further into the record, finding that there are no advertisements or other evidence in the record in which Auction Block held itself out as transporting cargo or passengers by water. See Decision, 22.

The ALJ also found that Auction Block submitted no evidence that it takes responsibility for the transportation from the port to a point of destination or that it transports goods overseas via a vessel operating on the high seas between a port in the United States and a port in a foreign country. Decision, 21-22. In so finding, the ALJ references Auction Block's failure to submit a single bill of lading.⁵ *Id.* at 22.

Similarly, in its Exceptions, Auction Block does not deny or even distance itself from Manager Yeoman's testimony that Auction Block is "packing" fish for international shipment.⁶ *Id.* at 21. It does not reject its earlier arguments before the Alaska Supreme Court regarding its shipping activities nor does it produce a single bill of lading demonstrating the transport of goods by sea. *Id.* It does not directly dispute a single factual finding by the ALJ.

Oddly, Auction Block does insert 12 pages of verbatim excerpts from the affidavits of Kevin Hogan and Jessica Yeoman and Auction Block's Findings of Fact without explanation, except to state that this evidence is "relevant, material, reliable and probative" and thus properly received by the [FMC]." Exceptions, 27-39. Among

⁵ It is worth noting that although Auction Block failed to produce a single bill of lading supporting its position, after Auction Block produced its bills of lading in response to an ALJ Order compelling it to do so, the City reviewed all of the bills of lading submitted by Auction Block, which was approximately 3,680 pages, and did not find a single one that involved shipment, international or domestic, via water. See January 3, 2013 Affidavit of Holly C. Wells Regarding Respondents' Brief, ¶¶ 3-4, RX 1310-1311.

⁶ Auction Block does imply elsewhere in its Exceptions that the FMC should generally rely on Auction Block's affidavits and not the deposition testimony of its officers because the deposition questions were scattered and random and Auction Block was able to sit down and coordinate its responses in its affidavits. Exceptions, 27, fn. 22. For obvious reasons, the City considers the deposition testimony far more probative than self-serving affidavits.

the information pasted into Auction Block's Exceptions are statements from earlier affidavits and from Auction Block's discovery responses that allege certain shipping practices by Auction Block. See, e.g., Exceptions, 31; 34. These assertions are not accompanied by any support from the record or even an argument as to their relevance. Additionally, they are surrounded by statements completely unrelated and irrelevant to the Decision. See, e.g., *id.* at 32.

Auction Block has repeatedly employed this "data dump" approach throughout these proceedings. In the past, the City suffered through the arduous process of decoding Auction Block's intended argument and then presenting the City's defenses to that argument. That approach, however, required presumptions by the City that are not appropriately made on appeal.⁷

The U.S. District Court for the District of Columbia has recognized that it is a party's responsibility to present, argue, and analyze the legal issues at issue in a case; the court will not "entertain . . . asserted but unanalyzed" claims. *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983). Here, therefore, the FMC should "decline to entertain" any perfunctory issue purportedly raised in Auction Block's data dump as Auction Block "has made no attempt to address the issue[s]" and has failed to develop or even identify the legal arguments associated with the data dump. *Id.* (citing *Alabama Power Co. v. Gorsuch*, 672 F.2d 1, 7 (D.C. Cir.1982)); see, e.g., *Slater v. Potter*, 28 F. App'x 512, 513 (6th Cir. 2002) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are

⁷ While Auction Block's unexplained data dump might be excusable if filed by a *pro se* litigant, Auction Block is represented by experienced counsel.

deemed waived.”); see also *State v. O’Neill Investigations, Inc.*, 609 P.2d 520, 528 (Alaska 1980) (“[w]hen, in the argument portion of a brief, a major point has been given no more than cursory statement we will not consider it further.”).

Accordingly, the City will not presume the significance of Auction Block’s data dump. There are no identified exceptions to the ALJ’s findings of fact and Auction Block has failed to reference a single independent piece of evidence supporting its assertion that it is a common carrier. Further, Auction Block’s verbatim excerpts from its Respondents’ Proposed Findings of Fact that are pasted into its Exceptions provide bold assertions but not a single citation to the record, which directly violates 46 U.S.C. § 502.221(d)(2) and the ALJ’s Order dated November 27, 2012.

As exemplified by the ALJ’s careful review, the record clearly demonstrates that Auction Block is neither a vessel- operating nor non-vessel-operating common carrier as it does not transport anyone or anything anywhere. Simply stated, marking a package “international” and then giving it to a shipper is not providing transportation or taking “responsibility for the transportation from the port or point of receipt to the port or point of destination.” If such were the case, simply giving a box to Federal Express would make a person a “common carrier.”

b. The City Does Not Provide Terminal Facilities in Connection with a Common Carrier on the Fish Dock

The ALJ’s determination that Auction Block failed to establish that the City provided services at the Fish Dock in connection with a common carrier is also sound and should be affirmed. Auction Block has provided absolutely no evidence other than backhanded assertions and conjecture that the City acts as an MTO on the Fish Dock.

Pursuant to 46 U.S.C. § 40102(14), an MTO for purposes of the Act is a:

person engaged in the United States in the business of providing wharfage, dock, warehouse, or other terminal facilities *in connection with a common carrier*, or in connection with a common carrier and a water carrier subject to subchapter II of chapter 135 of title 49.

(Emphasis added).

While the City has readily admitted and the ALJ has recognized that the City provides services to occasional common carriers and cruise ships on its Deep Water Dock and Pioneer Dock, there is absolutely no evidence in the record and the City has adamantly denied that it provides such services on the Fish Dock. Decision, 23-24. See also RX 1087.

Once again, Auction Block did not directly take exception to the ALJ's findings of fact regarding the services provided at the Fish Dock. It made no effort to reference any bill of lading, single advertisement, or any other form of independent evidence that the City serviced a common carrier at the Fish Dock. See generally, Exceptions. On the other hand, the City presented evidence in the form of affidavits, maps, photographs, and City policies and procedures establishing that the Fish Dock was not designed or capable of servicing common carriers and that any common carriers visiting Homer received services at the Deep Water Dock or the Pioneer Dock. Decision, 23-24 and citations to the record contained therein.

The City testified and Auction Block concurred that the Fish Dock has been designated by the City to support the commercial and sport fishing industry. See Complainants' Response to Respondents' Proposed Findings of Fact, No. 67, p. 23. The City's services include providing cranes for lifting nets of fish and ice for packing the fish. Despite Auction Block's sudden reference to its catch as "cargo" and its

transparent attempts to put a transportation spin on the process of catching and hauling the fish to shore for cleaning and gutting, the ALJ properly and aptly recognized the realities of the industry. Of course, once fish is extracted, processed, handled, and packed for delivery, it can, like any other good, fall under the scope of the Act. It is the resource extraction process, however, that occurs on the Fish Dock, and not the transportation.

In summary, the ALJ presented a comprehensive and well-reasoned Decision supporting her dismissal of Auction Block's Complaint due to its failure to prove that the FMC has subject matter jurisdiction over its claims. Auction Block provides no evidence to justify deviating from ALJ Wirth's findings of fact and conclusions of law regarding jurisdiction.

B. The ALJ Properly Granted the City's Motion to Strike and For Sanctions

Undoubtedly Auction Block's most indefensible exception is its challenge to the ALJ's order on the City's Motion to Strike and for Sanctions. The ALJ's remarkably tempered order on that motion granted the bare minimum relief necessary in light of the egregious conduct of Auction Block. Auction Block's failure to support its exception to the ALJ's order in any substantive way exemplifies the lack of support for that exception. See Exceptions, 50.

Throughout this proceeding, Auction Block has been excessively reluctant to provide the City with any evidence supporting its claims under the Act. From the onset, Auction Block has barraged the City with grand assertions and grave accusations and yet, when the City sought even the most basic business documents supporting Auction Block's claims, its requests were systematically met with silence

and subterfuge. See Respondents' Motion to Compel and November 27, 2012 Order; see *also* Motion for Sanctions and December 21, 2012 Order.

By far the most egregious of Auction Block's discovery offenses occurred with the filing of its Reply Brief on January 25, 2013. In its Reply Brief, Auction Block recited financial data that the City had repeatedly requested in its discovery requests and in subsequent motions to compel. See Motion to Strike and for Sanctions, 2; see *also* Amended First Discovery Requests to Complainants, Request for Production No. 9, CX 0051. While Auction Block provided express numbers and a convoluted explanation as to what those numbers reflected, it still failed to provide the underlying documents. Despite its continued failure to produce the records it was now allegedly citing from, Auction Block falsely stated in its Reply Brief that "[t]his information was disclosed by Complainants to Respondents as part of Complainants' financial disclosures including tax returns." See Motion to Strike and for Sanctions, 2-3. Auction Block provided absolutely no record citation or Bates number to identify such disclosures. *Id.* The City searched Auction Block's discovery for the records only to find that in actuality no such records had ever been disclosed to the City. See *id.* at 4-5.

Auction Block's omission would not be so egregious were it not for the ALJ's November 27, 2012 Order on Motion to Compel commanding it to produce all business records or records of fish sales, which encompassed the financial data cited by Auction Block in its Reply Brief, under penalty of sanctions. *Id.* at 5. The ALJ's Order on Motion to Compel was unequivocal: if it wasn't produced in discovery then Auction Block could not use it in its brief.

To the extent that there was any error by the ALJ, it was failure to provide monetary relief in the form of attorney's fees to a small municipality, which expended exorbitant sums fighting discovery battles with Auction Block. See *generally* Motion to Strike and for Sanctions.

C. Auction Block's Allegations of Technical and Procedural Error are Without Merit

In addition to Auction Block's exceptions to the ALJ's conclusions regarding subject matter jurisdiction and her order granting in part the City's Motion to Strike and for Sanctions, Auction Block raises numerous exceptions alleging technical and procedural errors. These arguments are wholly without support under law or in fact and should be rejected by the FMC.

1. The City Properly Denied Auction Block's Allegations in its Answer

Auction Block's insistence that the City has admitted to Auction Block's allegations against it because the City denied Auction Block's claims paragraph-by-paragraph rather than sentence-by-sentence in the City's Answer is downright frivolous. In its Answer, the City expressly denied the allegations made by Auction Block and even asserted lack of subject matter jurisdiction as an affirmative defense. Auction Block's claims to the contrary are disingenuous at best and should not be entertained.

With respect to FMC jurisdiction over the City as an MTO, Auction Block alleged as follows in its Fourth Amended Complaint:

The City of Homer operates the Port and Harbor and has filed the "Port of Homer Terminal Tariff No. 600 Filed under ATFI Rules" which have been adopted and ratified by the Homer City Council. The City and Port are subject to the provisions of the Shipping Act of 1984, as amended, as a "marine terminal operator" as defined in 46 U.S.C.

§ 40102(14) and other authority and as a “person” as defined in the former 46 U.S.C. § 1702(18) and in 46 C.F.R. § 515.2(p) and other authority. The Federal Maritime Commission has subject matter jurisdiction of this matter and personal jurisdiction of the respondents.

See Fourth Amended Complaint, 2, CX 0273.

In response, the City specifically denied that allegation:

Respondents admit that the City of Homer operates the Port of Homer and has filed the “Port of Homer Terminal Tariff No. 600 filed under ATFI Rules,” which has been adopted and ratified by the Homer City Council. Respondents deny any other allegations in Paragraph III.

See Amended Answer to Fourth Amended Complaint, 2, CX 0282 (emphasis added).

In all of its answers, the City also asserted as an affirmative defense that “[t]he Commission lacks jurisdiction of the subject matter” of Auction Block’s complaints. See *id.*, at 3, CX 0283; see also the original Answer filed May 9, 2012.

There is nothing in either the rules of the FMC or the Federal Rules of Civil Procedure requiring the City to pick apart each sentence of Auction Block’s Complaint. Despite Auction Block’s attempt to impose a heightened pleading standard in FMC proceedings, the only FMC rule regarding the content of an answer requires simply that the facts in a complaint be “specifically denied.” See 46 C.F.R. § 502.64(a). The FMC does, however, state in an answer template provided to the public on the FMC website that an answer before the FMC should contain:

...subsequent paragraphs to be numbered II, III, etc., appropriate and responsive admissions, denials, and averments, specifically answering the complaint, paragraph by paragraph.

See http://www.fmc.gov/assets/1/Answer_to_Complaint_Format.pdf, RX 613 (emphasis added). At the time the City filed its Answer to the Fourth Amended Complaint, the FMC rules actually included the Answer template. See Exhibit 2 to Subpart E of former 46 C.F.R. § 502.64. The City followed this instruction when

preparing its Answer. Accordingly, each numbered paragraph in Auction Block's complaint is specifically answered by the City. See City's Answer to Fourth Amended Complaint, CX 0281-285. Auction Block cites no authority that would support declaring insufficient the City's paragraph by paragraph denial of Auction Block's allegations.⁸

The City not only specifically denied Auction Block's allegations, it repeatedly and consistently made its denials known throughout discovery and in motion practice. See, e.g., City's Discovery Responses, RX 372-398; City's Motion for Partial Summary Judgment dated September 17, 2012.

The City's denial of and affirmative defense against FMC jurisdiction could not be more plain. Auction Block's exception should be denied.

2. The City's Affidavits are not "Untimely Testimony"

Much like Auction Block's allegation that the City failed to specifically deny the allegations against it, Auction Block's argument that the City should be prohibited from relying on affidavits where the witnesses were not named in the City's Initial Disclosures is nothing more than a distraction from the merits. Auction Block was made aware of the witnesses of whom it protests well before the parties filed their prehearing briefs. Auction Block's failure to actively engage in discovery was a

⁸ Auction Block's reliance on *Capital Transportation, Inc. v. Federal Maritime Commission*, 612 F.2d 1312, 1318 (1st Cir. 1979) is misplaced. In that case Capital Transportation, Inc. never denied or challenged its status as an NVO common carrier until after the FMC had issued its decision and had, instead, tacitly conceded such status throughout the FMC proceedings. *Id.* at 1312. Unlike the defendant in *Capital Transportation, Inc.*, the City expressly and specifically denied Auction Block's allegations at all stages of this proceeding.

calculated decision by it and cannot be remedied by banning the City from presenting its defense. Such an outcome would be extremely prejudicial to the City.

In its Exceptions, Auction Block implies that the City intentionally delayed in presenting its defenses and “flood[ed] the file” with inadmissible statements from non-disclosed witnesses. See Exceptions at 46. The City properly disclosed its potential witnesses and engaged in timely discovery. In its Initial Disclosures, the City disclosed Walt Wrede and Bryan Hawkins as well as an Icicle representative to be identified later. See Initial Disclosures at 2-3, CX 0122-123. The City also put Auction Block on notice that it may potentially rely upon a rebuttal expert who would be identified later. *Id.* at 4, CX 0124.

Shortly after the parties filed their Initial Disclosures, they filed a Joint Motion and Memorandum to Stay Case Pending a Decision on Appeal in the Case *Maier Terminals, LLC v. Port Authority of New York and New Jersey*. At that time, the parties ceased all discovery efforts pending the ALJ’s decision on that motion. On August 9, 2012, the ALJ denied the parties’ motion. The City, which had yet to receive a single document from Auction Block, quickly took steps to participate in discovery. See The City of Homer’s First Discovery Requests served August 21, 2012. The very first deposition scheduled by the City was the 30(b)(6) deposition of Icicle. See Subpoena Notice of Taking Deposition Icicle Seafoods served September 7, 2012. In response to the City’s deposition notice, Icicle designated Kenneth “Duff” Hoyt as its representative. See *generally* Excerpt from 30(b)6 Deposition of Icicle Seafoods, 1, RX 1. The City deposed Mr. Hoyt in the presence of Auction Block’s counsel. *Id.* at RX 7. After engaging in written discovery with

Auction Block, conducting all of its depositions and engaging in unsuccessful mediation efforts, the City filed its Motion for Partial Summary Judgment Regarding Statute of Limitations arguing that Auction Block was barred from reparations by the statute of limitations. See Motion for Partial Summary Judgment Regarding Statute of Limitations filed October 10, 2012. The City contacted Icicle and requested an affidavit regarding Icicle's lease negotiations with the City. In response, Icicle submitted an affidavit of John Woodruff, Icicle's Vice President of Operations. See Affidavit of John Woodruff (October 9, 2012), RX 1105-1113. The City served Auction Block with that Affidavit the day after it was received. *Id.* at 4, RX 1108. Auction Block did not challenge Mr. Woodruff's affidavit until over a month after its submittal and it never requested an opportunity to depose Mr. Woodruff. See Complainants' Reply to Response to Motion and Memorandum for Entry of Summary Judgment filed November 15, 2012.

The City disclosed Charles H. Sparks on November 17, 2012. The City did so in direct response to (1) Auction Block's suggestion in its Motion for Summary Judgment that it might rely on expert testimony, and (2) its submittal of a report that resembled but was not disclosed as an expert report. See Respondents' Rebuttal Expert Disclosure on Remedy (Dr. H. Charles Sparks) served November 17, 2012. The City also fully disclosed all of the affiants and potential witnesses in the Joint Prehearing Statement filed on November 6, 2012.

While parties are sometimes prohibited from using testimony by previously-identified witnesses in dispositive proceedings, the rule is inapplicable where the other party was aware of the existence of the witness. See *Davis v. Bancorp*, 383

F.3d 761, 765 (8th Cir. 2004) (where movant knew of affiant's role in the case, motion to strike affidavit properly denied); *Design Strategies v. Davis*, 228 F.R.D. 210, 212 (S.D.N.Y. 2005) (party knew potential witness personally, thus there was no prejudice and motion for sanction was denied); *Gutierrez v. AT&T Broadband, LLC*, 382 F.3d 725 (7th Cir. 2004) (without 'surprise,' motion to strike was properly denied).

There can be no dispute that Auction Block was aware prior to briefing that Kenneth Hoyt, John Woodruff, and Charles Sparks were potential witnesses. Again, Mr. Hoyt was deposed by the City on September 19, 2012. Auction Block's President, Kevin Hogan, was present. Mr. Woodruff testified twice prior to briefing as part of summary judgment motions practice: once on October 9, 2012, and again on November 2, 2012. Mr. Sparks, the City's expert witness, was identified in the City's Rebuttal Expert Disclosure on November 17, 2012.

Auction Block's transparent attempt to evade the City's defenses by banning virtually all testimony relied upon by the City is without support in the record or the law and should be rejected.

3. The City's Affidavits are not Parol Evidence

In furtherance of its evasive tactics, Auction Block also objects to all of the affiants relied upon by the City due to their alleged lack of knowledge and the parol evidence rule. See, Exceptions, 48-50. This assertion is also without support.

Auction Block's attempt to apply a rule of contract law to testimony of City affiants is misguided. Parol evidence is evidence that varies the terms of a fully integrated contract. See *Lower Kuskokwim School Dist. v. Alaska Diversified Contractors, Inc.*, 734 P.2d 62, 63 (Alaska 1987); see also *Norville v. Carr-Gottstein Foods Co.*, 84 P.3d 996, 1005 (Alaska 2004). Auction Block does not say what

contract is in dispute, much less why the affidavits of Messrs. Woodruff, Sparks, and Hoyt are parol evidence of the terms of such a contract. The closest Auction Block gets is reference to the "subjective intent" of the City and Icicle in their lease agreements.⁹ Auction Block's assertion that anything in the affidavits is intended to define or supplement the terms of those leases is incorrect. The purpose of the testimony is to demonstrate the reasonableness of the City's conduct at the time the contracts were negotiated and thus the City's compliance with 46 U.S.C. § 41108(2).

Auction Block's allegations that the affiants should only be permitted to testify regarding facts that fall within their personal knowledge ignores the dual roles that representatives of an entity serve. While, for example, Mr. Wrede, the City Manager, testifies as an individual with knowledge from his individual experiences, he is also a representative of the City and testifies regarding the institutional knowledge he has accumulated and holds as a City representative. This is also true for employees and officers of Icicle. The courts have recognized the need to permit government representatives to testify as a representative of the government entity they serve. See *S.E.C. v. Morelli*, 143 F.R.D. 42, 45 (S.D.N.Y. 1992) (SEC representative was suitable witness to testify in Rule 30(b)(6) deposition despite lack of firsthand experience in facts of the case). This rationale is especially applicable in this proceeding where the City's lease with Icicle was entered into over 30 years ago.

⁹ Auction Block also suggests that the affidavits seek to vary "the express written provisions in the Tariffs." See Exceptions, 48. But the City's Terminal Tariff No. 600 is a publication, not a contract. See 46 C.F.R. § 525.1(c)(17).

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D. Conclusion

For all of the reasons stated above and throughout the City's briefing, motion practice, and record, the Decision is sound and Auction Block's Exceptions are without merit. The City thus respectfully requests that the Decision be affirmed and Auction Block's Complaint be dismissed with prejudice. The City also reiterates its position that oral argument is unnecessary in this case.

DATED at Anchorage, Alaska this 29th day of July 2013.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 29th day of July 2013, a true and correct copy of the foregoing was served on the following in the manner indicated:

Mr. Steven J. Shamburek	<input checked="" type="checkbox"/>	U.S. Mail
Law Office of Steven Shamburek	<input type="checkbox"/>	Facsimile
425 G Street, Suite 610	<input checked="" type="checkbox"/>	Electronic Delivery
Anchorage, AK 99501	<input type="checkbox"/>	Hand Delivery

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By: 
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